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Clerk of the Supreme Court
Attn: Deputy Clerk-Rules
P.O. Box 1688
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Honorable Justices of the Supreme Court,

Thank you for the opportunity to submit comments on Supreme Court Rule Petition 20-09A, regarding the use of videoconferencing technology in court proceedings.

The State Public Defender's Office (SPD) appreciated the opportunity to participate in the Zoom Task Force meetings that preceded Supreme Court Rule Petition 20-09. We also appreciated the opportunity to work with the petitioner prior to submission of this pending petition. In general, SPD sees value in the expanded use of videoconferencing technology. However, that expanded use must be accompanied by strict limitations based on the defendant's federal and state constitutional rights ensuring the rights to confront witnesses, a public trial, due process, equal protection and the right to effective assistance of counsel. Specifically, the Sixth Amendment to the United States Constitution provides confrontation rights, generally, but that right is made even more clear in the Wisconsin Constitution, Article 1, Section 7, stating that the accused shall have the right to "...meet the witness face to face..."

The coronavirus pandemic became a crash course on the widespread use of videoconferencing in the criminal justice system. It allowed cases to move forward while attempting to protect the health of litigants, counsel, and court personnel. That said, videoconferencing is a tool to supplement the process of hearing cases, but it likely will never completely replace the need for in person client meetings outside of court or for in-court critical proceedings. From the SPD perspective, the value of videoconferencing is in allowing virtual court hearings for ministerial tasks such as scheduling and status conferences. While it has been used beyond that for more critical proceedings during the pandemic, it is a practice that may not continue in a similar manner in the post-pandemic world.

In general, any expansion on the use of videoconferencing technology in critical proceedings must be accompanied by a provision allowing the defendant the unqualified right to demand that the proceeding be held in person. The notion that a litigant should be permitted to demand an in-person hearing for a jury trial, for instance, has been recognized by the Legislature and Governor, who together enacted 2021 Wisconsin Act 141, pertaining to videoconferencing in juvenile and adult proceedings. Although Act 141 permitted the use of videoconferencing in any juvenile or adult proceeding, it limited expansion by providing that a court must sustain an objection made by any party to the use of videoconferencing at a critical proceeding (WIS. STAT. § 967.08(4)). Act 141 was an example of the legislature exercising an area of shared statutory authority with the Supreme Court. It remains unclear what changes would need to be made to Petition 20-09A to account for the changes made to statute by Act 141.

Though the SPD had an opportunity to work with the petitioner, there remain specific concerns with the language of the proposed petition. Without accounting for Act 141, SPD offers the following comments related to Petition 20-09A.

Section 2

By changing the definition of a “participant” to include a victim, this proposed change, when read in conjunction with WIS. STAT. § 885.54(1)(c), appears to exempt victims from sequestration orders. According to WIS. STAT. § 885.54(1)(c), participants, to include victims under the proposed language of the petition, must be allowed to observe the courtroom in a manner as similar as practicable to being present in the courtroom. To the extent that this change obviates sequestration for victims, that change directly impacts the defendant’s state and federal constitutional rights of confrontation, due process and effective assistance of counsel. Substantively, Wisconsin Constitution Article 1, Section 9m, Clause 6¹ should at a minimum give a court discretion to sequester a victim, especially in cases with multiple victims where such an order upholds fairness of the trial. Setting aside substantive arguments, it is important to note that although this Court may adopt procedural rule changes, this proposed change weighs on a defendant’s substantive rights.

Sections 12 and 22

Section 12 makes changes to WIS. STAT. § 885.56(1), which outlines a discretionary list of factors that a judge may consider when determining whether to permit video conferencing in lieu of in-person testimony. If amended, the court would simply consider the witness’s availability to testify, and not whether the proponent made a diligent effort to secure the witness’s attendance.

Although current law provides that a court may only use its discretion to order videoconferencing over the objection of the defendant in a non-critical proceeding, Section 22 would expand the court’s discretionary powers to also cover critical proceedings.

As explained in more detail below, the SPD opposes any change that would result in videoconferencing during a critical proceeding, over the objection of the defendant. And the change to section 12, coupled with the change to section 22, further lowers the bar by relieving the proponent of a witness from making a diligent effort to secure a witness’s attendance at a critical proceeding.

The use of video rather than in-person appearances can negatively affect the attorney’s ability to adequately cross-examine the witness and detract from the lawyer’s ability to observe non-verbal cues of the witness.

In addition, there may be many reasons that even a brief examination of a witness is necessary. For instance, Wisconsin State Crime Laboratory analysts are not permitted to speak directly with defense counsel outside the presence of the prosecutor. This can severely limit the ability to have contact with these vital witnesses prior to their testimony. Further limiting access by indiscriminately allowing the court to determine whether or not a witness can appear remotely has direct and significant consequences on the ability to provide a full defense.

¹ “This section is not intended and may not be interpreted to supersede a defendant’s federal constitutional rights or to afford party status in a proceeding to any victim.”

Sections 13 and 15

Sections 13 and 15 provide the ability for a jury to participate in a proceeding by videoconferencing if they remain in the presence of a bailiff and at the location where court is being held. As stated in the supporting memorandum, this provision "...permits the possibility for jury trials to continue in situations when there are safety concerns or construction issues where, for example, jurors may need to view the trial from a different room in the courthouse."

This modification creates a rule for the exception, and the language provides an opening for misinterpretation or misapplication of this provision. The amendment would allow a court to permit a jury to appear by video for the duration of a trial: voir dire, opening statements, the state's case, the defense's case, rebuttal and closing statements. The members of the jury would never be in the same physical space as the Court, the defendant, or the witnesses. Jury trials implicate significant liberty interests. Jurors also assume an important fact-finding function that requires the group to assess the credibility of witnesses. At a minimum the language creates an appearance of unfairness, but in reality, it is likely to engender actual prejudice.

Sections 19 - 23

Together, these sections remove the protections that were designed to uphold the rights of defendants during a critical stage of the proceeding.² Section 19 deletes the mandatory opt-out provision that a defendant could exercise at a critical proceeding. In its place, Sections 20 through 23 establish new guidelines for courts, failing to provide the same level of guidance and protection for the defendants' constitutional rights as the current statutory scheme. If adopted, a court may order the remote appearance of a witness at a critical proceeding such as a jury trial, over the objection of the defendant.

The defendant's right to be physically present is multifaceted. At its most basic level, the defendant's right to be physically present guarantees the defendant's physical presence in a courtroom with his or her counsel. But the right to be physically present does not end there. It also encompasses the right to be in the same room as a judge during sentencing; and the right to confront one's accuser "face to face." In other words, putting a defendant into an empty courtroom with his or her counsel, where all other parties appear by video, does not accomplish the right to be physically present.

Requiring a court to affirmatively find waiver before permitting the remote appearance of a defendant at a critical proceeding adequately protects the first prong of the dual protections envisioned by WIS. STAT. § 885.60(2)(d). However, no similar provision exists to require the court to take a waiver regarding a witness's remote appearance at a critical proceeding. Rather, Section 22 suggests that the determination of whether a witness appears at a critical hearing is subject to the discretionary factors outlined in WIS. STAT. § 885.56(1) and several other enumerated factors.

Our view is that federal and constitutional law, as well as statutory authority outlining the defendant's right to confrontation and to be physically present requires in-person appearances of witnesses at trial if a defendant objects. To summarize our position outlined previously:

² The comment to the 2008 rule made clear that the mandatory opt-out provision was created to preserve constitutional and other rights to confront and effectively cross-examine witnesses.

- The defendant's right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 7 of the Wisconsin Constitution must unequivocally allow the defendant to demand that a witness appear personally at an evidentiary hearing. The use of video rather than in-person appearances can negatively affect attorney performance; detract from the lawyer's ability to observe non-verbal cues of the witness; impair communication; and hinder counsel's ability to adequately cross-examine witnesses.
- The defendant's confrontation rights, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, § 7 of the Wisconsin Constitution ("shall enjoy the right . . . to meet the witnesses face to face") must permit the defendant to require that a witness appear personally at an evidentiary hearing. Although two-way video conferencing more closely approximates face-to-face confrontation, it is in no way the constitutional equivalent to the confrontation right envisioned by the constitution.
- The defendant's due process rights, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and art. I, § 8 of the Wisconsin Constitution require in-person appearances at any stage in the criminal proceeding that is critical to the outcome if the defendant's presence would influence the fairness of the proceeding. *United States v. Gagnon*, 470 U.S. 522 (1985).
- There are statutory rights³ guaranteeing the physical presence of a defendant, as well as case law.⁴ Permitting a witness to appear by video conferencing at trial over the objection of the defendant interferes with the statutory right to be physically present. An amendment suggesting that the decision falls within a judge's discretion misstates the law, and invites confusion.

The Supporting Memorandum states that "The subcommittee debated potential issues with expanding the statutes as discussed here, particularly with regard to the rights of criminal defendants. However, while these rights must be preserved, they must be balanced against the rights of victims and the court system's goal to avoid unnecessary delays and keep cases moving forward." We do not feel that this accurately reflects either the Wisconsin constitution (again referring to Article 1, Section 9m, Clause 6), nor is there a federal or state constitutional right to efficiency at the expense of liberty. Moreover, to the extent that a proposed rule change affects substantive rights, rather than procedure, rulemaking is not the appropriate vehicle to accomplish necessary change.

In the end, there are circumstances unique to each case that may require the in-court testimony of key witnesses. The use of video rather than in-person appearances can negatively affect the attorney's ability to adequately cross-examine the witness and detract from the lawyer's ability to observe non-verbal cues of the witness. Permitting remote witness appearances at trial, over the objection of the defendant, may have direct and significant consequences on the ability to provide a full defense. That change also bears squarely on the defendant's statutory right to be physically present, and other substantive rights including but are not limited to the rights to confront witnesses, to a public trial, to due process, equal protection and the right to effective assistance of counsel.

Given the importance of this topic, should the Court decide to proceed with revised petition 20-09A, we believe that the court members would benefit from both these written comments as well as a public

³ One example is WIS. STAT. § 971.04 which is addressed in greater detail below. Also consider WIS. STAT. § 55.10 ("the petitioner shall ensure that the individual sought to be protected attends the hearing on the petition unless, after a personal interview, the guardian ad litem waives the attendance").

⁴ *State v. Anderson*, 2017 WI App 17, ¶ 29, 374 Wis. 2d 372, 394, 896 N.W.2d 364, 374; *State v. Soto*, 2012 WI 93, ¶ 34, 343 Wis. 2d 43, 61-62, 817 N.W.2d 848, 857

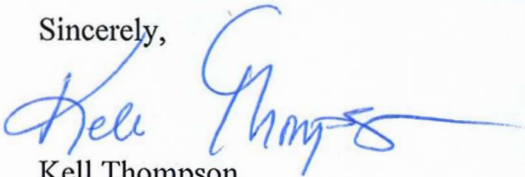
hearing to ensure that practitioners have an opportunity to provide feedback on the impact of the petition on the practice of law throughout Wisconsin.

While the revised version of the petition addresses the same topic area, it takes a different approach than the original petition. As SPD reviewed the revised version of the petition, we realized that our concerns, while generally overlapping with the original petition, differ when focusing on specific language.

The use of videoconferencing can be positive in several types of court proceedings, but for critical stages the need to strictly limit its use may be necessary to protect the statutory and constitutional rights of defendants. At critical stages of the trial, using videoconferencing may not adequately preserve the fairness, dignity, solemnity, and decorum of court proceedings. Efficiency of the court system is an admirable goal until it jeopardizes the due process rights of those appearing in court. The limitations included in the petition language are welcome, but ultimately we must protect the due process rights of the individual.

Thank you again for the opportunity to provide these written comments on rules petition 20-09A.

Sincerely,



Kell Thompson
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